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No. 96-1172

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE HONORABLE WILLIAM STRATE, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Reservation; THE TRIBAL COURT OF THE FORT BERTHOLD INDIAN RESERVATION; LYNDON BENEDICT FREDERICKS; KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICI CURIAE LAKE COUNTY, MONTANA, AND FLATHEAD JOINT BOARD OF CONTROL OF THE MISSION, FLATHEAD, AND JOCKO VALLEY IRRIGATION DISTRICTS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, *amici curiae* file this brief in suport of Respondents. Letters of consent from counsel for all parties have been filed with the Clerk.

A. Lake County, Montana

Upon entry of the State of Montana into the Union[1], and after a later reorganization of counties, the State placed within the ambit of Lake County's authority and responsibility most of the land within the exterior boundaries of the federal Flathead Indian reservation, which Congress reserved from the Nation's public lands when it ratified the July 16, 1855 Treaty of Hellgate on March 13, 1859 (12 Stat. 975).[2] In 1904, Congress enacted the Flathead Allotment Act ("FAA"), Act of April 23, 1904, 33 Stat. 302, implementing the policies of the General Allotment Act ("Dawes Act") of 1887 (codified as amended, at 25 U.S.C. §§ 331, *et seq.*) on the Flathead reservation. After making allotments of land to tribal members, Congress, in the FAA authorized nonmembers to enter the reservation and acquire fee title to land under the "general provisions of the homestead, mineral, and town-site laws of the United States," with two exceptions, the second of which is particularly significant. First, timber lands were not subject to entry. Second, as upon the entry of the State into the Union, Congress granted sections sixteen and thirty-six of each township within the exterior boundaries of the reservation to the State for

[1] § 10, Act of February 22, 1889, —— Stat. ——, "An Act to Provide for the Division of Dakota into Two States and to Enable the People of North Dakota, South Dakota, Montana, and Washington to Form Constitutions and State Governments and to be Admitted into the Union on an Equal Footing with the Original States, and to Make Donations of Public Lands to Such States," providing, *inter alia*, for the grant of each section 16 and 36 within the territory of the states for school purposes, "except those embraced in Indian, military, or other reservations . . . until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain."

[2] In addition, Lake County encompasses a good deal of land beyond the exterior boundaries of the reservation and including thousands of County residents whose status is no different from those residing within the exterior boundaries of the reservation, but for that single fact.

school purposes. FAA, § 8[3]. The County seat is located in the town of Polson, within the exterior boundaries of the reservation.

B. Flathead Joint Board of Control of the Mission, Flathead, and Jocko Valley Irrigation Districts

In 1908, in an amendment to the FAA, Congress authorized the construction of an irrigation and power project to irrigate all irrigable allotted and unallotted lands within the boundaries of the reservation. Act of May 29, 1908, 35 Stat. 448, amending §§ 9 and 14 of the FAA. *See also* Act of April 30, 1908, 35 Stat. 83. After the completion of the majority of construction on the irrigation project, Congress in 1926 enacted legislation authorizing the formation and operation of the Districts under state law and their jurisdiction over all fee lands. Act of May 10, 1926, 44 Stat. 453, 464.

The Flathead Joint Board of Control ("JBC") serves as a central operating authority for the Mission, Flathead, and Jocko Valley Irrigation Districts, formed in the late 1920's and early 1930's under state law as provided by the 1926 Act. Each entity is a local government under Montana law. § 85-7-101, *et seq.*, Mont. Code Ann. (1995). The land and constituents they serve are located within the original exterior boundaries of the reservation. The Districts contain within their boundaries approximately 113,000 acres. Their constituency is comprised of both tribal members and nonmembers, presumably in roughly the same percentages as the general population.[4]

[3] *See* note 1, quoting language from Enabling Act of February 22, 1889, indicating that Congress' grant of sections 16 and 36 of each township would occur after "the reservation shall have been extinguished and such lands restored to, and become a part of, the public domain."

[4] The Districts and JBC as local governments are neither interested in nor legally allowed to make any decisions based on a constituent's race or even to inquire into his or her race. They, therefore, do not have information on this issue. The Flathead

See below. Approximately 2,000 families, farmers and ranchers, are represented by the Districts and JBC.

As the result of these and other Congressional acts implementing the Dawes Act, nonmembers constitute 81-82 percent of the population of the Flathead reservation today.[5] Of the 1.245 million acres within the original reservation, 553,151 acres are now owned by nonmembers.[6]

In this brief, *Amici* are concerned with preserving their ability to exercise the authority delegated them by the State to fulfill the responsibilities the Legislature requires them to bear on behalf of the citizens of the county and the members of the Districts.

Lake County's ability to perform its governmental functions is impaired and at times shackled by assertions of regulatory and adjudicatory authority by the Flathead Tribes over non-tribal lands and people.[7] At times its citizens receive less governmental service, uneven protection of the laws, and more governmental interference as a

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Tribes, however, do keep track of such statistics, and they are the source of the figures here.

[5] The 1990 census recorded 21,259 individuals living on the reservation. Of these, 5,110 are Native Americans. Of this latter amount, according to the Flathead Tribes, 3,976 are tribal members.

[6] The Flathead Tribes provided this data in an application to the Environmental Protection Agency for Treatment as a State status under §518 of the Clean Water Act (33 U.S.C. § 1377) to establish water quality standards, regulate wetlands, and issue § 401 certifications for the entire reservation. *Amici* assume their essential veracity.

[7] *Amici* serve all their constituents, tribal members and nonmembers. They do not necessarily concede they lack, *in toto*, either responsibility for or authority over tribal lands or members. Under the 1926 Act, the JBC and Districts clearly do have responsibilities for tribal member land owned in fee. *Amici* recognize, however, certain limits to their authority. Since the issue in this case concerns tribal authority over nonmembers on open, non-tribal property, *amici* address only the potential implications of this decision for their responsibilities to nonmember citizens.

result of the conflicts of authority arising from the Tribes' assertions of powers over nonmembers. The government of Lake County is burdened, indeed, retarded by this situation in much the same manner as were the local governments analyzed in *Hagen v. Utah*, —— U.S. ——, 114 S.Ct. 958, 970 (1994). The fulfillment of many government duties, routine in other counties, such as roadwork, repair of bridges, placement and updating of traffic controls, zoning, and planning are often deferred, delayed, or simply canceled. The work of law enforcement and fire fighting, and other emergency service, which more than other government functions frequently require swift and sure action, is also delayed, complicated, and at times, unfortunately, unfulfilled because of issues arising out of jurisdictional conflicts over land and people.

Lake County is traversed by state and federal highways. One, Highway 93, which runs North and South through the county, is a narrow two-lane highway in need of updating, especially to accommodate the influx of permanent residents to the area and tourists. Lake County is situated between the city of Missoula 30 miles to the South, the largest population center in western Montana, and tourist centers to the North, such as Glacier Park, Whitefish ski resort, Kalispell and Flathead Lake. Literally tens of thousands of tourists, from Montana and elsewhere, traverse Lake County through Highway 93 every year. Neither they nor nonmember residents of Lake County have in any way consented, by their presence in the portion of Lake County within the reservation, to tribal government's control of them.

Yet, the Flathead Tribes have asserted civil regulatory authority over nonmembers on non-tribal property, encompassing also adjudicatory authority. This claim of sovereignty extends to many aspects of daily life, including control of water quality issues, to the exclusion of state, and therefore local, government authority. It also includes

authority to adjudicate disputes which arise anywhere on the reservation, including the state and federal highways.[8] This places administrative and financial burdens on Lake County, including its judicial system, the Twentieth Judicial District of Montana.

It also places Lake County in the anomalous position of having to treat issues arising within the boundaries of the reservation but on non-tribal property in a manner significantly different from the way they would be handled, perhaps only a few steps away, off the reservation. Thus, by their various and broad claims of sovereignty, the tribes cause Lake County to treat its constituents differently. And they cause Lake County residents living within the boundaries of the reservation to receive not only different governmental services but services often of a more intrusive, complicated, and inconclusive nature and of a lesser quality. This has additional negative social effects for Lake County.

Because of the tribe's claims to sovereignty over nonmembers and their property, county residents who are not tribal members but who fall within the compass of the tribes' claims, frequently express frustration, anger, fear, and ultimately cynicism about their state and local governments, tribal government, and their status, as they see it, as second class citizens subject to the claims of a government which excludes them. In Lake County's experience, this gives rise not only to apathy and cynicism about government. Because of uncertainty about whether state and local or tribal regulatory powers, or both, apply to non-tribal property, Lake County's experience shows

[8] *See* Ordinance 36B, Flathead Tribes Law and Order Code, Ch. 1, § 1, asserting jurisdiction to the "fullest extent possible not inconsistent with federal law" over "all persons found within the reservation." As quoted in *Moran v. Council of the Confederated Salish and Kooteni Tribes, et al.*, 22 ILR 6149 (1995). *See also Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994) *cert. denied* —— U.S. ——, 115 S.Ct. 485 (1994).

that county residents are at times reluctant to voluntarily comply with permitting programs or even to report incidents—such as a spill requiring a clean up response—for fear they will be heavily penalized through one of the number of tribal civil regulatory ordinances in which the tribes claim sovereignty over nonmember activity on non-tribal property.[9] This hampers Lake County's ability to administer and enforce regulatory programs, particularly through voluntary compliance, the most effective, economical, and least intrusive means of governmental regulation.

For these reasons, Lake County and the JBC oppose what they believe are excessive claims of tribal sovereignty over nonmembers on non-tribal property, both because nonmembers cannot participate in that government and because it excludes the republican forms of local government expressly authorized and required by Congress in the Enabling Act of February 22, 1889 and the Act of May 10, 1926. *Cf. State of Montana, Lake County, et al. v. United States Environmental Protection Agency, et al.*, ——F.Supp —— (D.C. Mont. 1996), on appeal to Ninth Circuit Court of Appeals, No. 96-35508.

As to non-tribal property within reservation boundaries which Congress opened to nonmember access and from which the tribes may not exclude anyone, *amici* believe the Court has clearly held tribal inherent sovereign power abrogated. *Amici* argue that, as to such non-tribal property in an "open" area, the Court's decisions allow tribes to affect and control the activities of nonmembers through an action in federal court in the appropriate circumstance, if the activity constitutes a demonstrably serious impact on the tribe, imperilling its political integrity, economic security, or health or welfare. This standard derives from

[9] For example, in the Aquatic Lands Conservation Ordinance, No. 87A, the Flathead tribes assert authority over all activities on wetlands within the reservation, including the 50% non-tribal land, as well as the authority to levy fines, and enforce them in tribal court, of up to $25,000.00 per day for noncompliance.

the Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) (the "second *Montana* exception) and the discussion there of possible sources of tribal authority over nonmember activity on non-tribal property; and the refinements to that discussion in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) and *South Dakota v. Bourland*, 508 U.S. 679, 113 S.Ct. 2309 (1933).

The Flathead tribes, however, like other tribes around the country, including the Petitioners here, continue to rest broad claims to sovereign authority over nonmember activity on non-tribal property in open areas on an over broad interpretation of this possible exception to the general rule. *Amici* therefore ask the Court to state the rule, on the grounds given below, that nonmember activity on non-tribal property from which the tribe has no power to exclude anyone lies beyond the reach of the tribe's inherent sovereign power.

SUMMARY OF ARGUMENT

1. This case presents the issue of the limits of an Indian Tribe's inherent sovereign power over those who are not members of the Tribe, including whether there are constitutional limits to such power. *Amici* urge the Court to affirm the lower court's decision and in so doing to establish that a tribe's sovereign power runs only to those who have given their consent, either as members of the tribe or in exchange for access to property over which the tribe retains the power of exclusion.

2. These amici assume Respondents and other amici will cut through the thickets of preliminary and largely irrelevant argumentation presented by Petitioners and their supporters. To be sure, this Court wrote in its opinions in two cases of the centrality of tribal courts for the exercise of sovereignty. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Iowa Mutual*

Ins. Co. v. LaPlante, 480 U.S. 130 (1982). The United States are in fact supportive of tribal sovereignty; Congress has generously supported the flowering of tribal courts and the invigoration of tribal governments. Many tribal courts are, in fact, more competent and well-staffed than even fifteen years ago.

A. Such assertions, however, beg the question.[10] The cases Petitioners and their supporters now set up as exemplars of this Court's recognition of sweeping tribal sovereignty in all the fullness of that term in fact established a procedure requiring the exhaustion of tribal remedies before challenging assertions of tribal jurisdiction in federal court. Nothing more. *See Yellowstone County v. Pease*, 96 F.3d 1169, 1175 (9th Cird. 1996) (agreeing with the Eighth Circuit *en banc* decision in this case that *Iowa Mutual* and *National Farmers* are "exhaustion cases that did not decide whether tribes had jurisdiction over nonmembers," the Ninth Circuit rejected the argument these decisions extended tribal sovereignty or that "tribal

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[10] *Amici* United States, relying on language from *Iowa Mutual v. Laplante*, 480 U.S. at 9, 19, link their argument in favor of tribal sovereignty here with the statement that "attacks on the institutional competency of tribal courts [are] 'contrary to . . . congressional policy.'" It should be clear that opposition to a Tribe's "excessively claimed sovereignty," (*A-1 Contractors v. Strate*, 76 F.3d 930, 940 (8th Cir. 1996), is not an attack on the competence of that Tribe's institutions. Conversely, the competence of a Tribe's institutions cannot create sovereignty where it does not exist. Finally, Congress' policy to generously support the creation of competent tribal institutions neither magically makes such competence a reality nor creates sovereign power for those institutions to wield where it does not otherwise exist. Thus, it is illogical to argue that because tribal courts are competent or because Congress desires them to be so their sovereign—the Tribe—*ipso facto* possesses authority over nonmembers. Whether a tribal court has the professional competence to handle a matter and whether a tribe possess sovereign authority over the matter are two separate inquiries, and the first is not relevant to the second.

adjudicatory jurisdiction over non-Indians is much broader than the tribal regulatory authority. . . .")[11]

B. Similarly, that Congress, exercising its plenary power over Indian affairs, has supported tribal courts and tribal self-determination, neither alters nor answers the question: what inherent sovereign powers do Indian Tribes have over nonmembers? The representative of the people of the United States, and the keeper of the plenary power of the United States over Indian affairs, Congress, has in fact supported tribes in many ways. But such policies do not create inherent sovereign power or limn its contours. Congress' enactments on behalf of tribes nowhere state the intent to extend tribes' sovereign power to nonmembers. The proper inference to draw from the lack of congressional extension of tribal sovereignty in its numerous acts in support of many tribal interests, as *amici* Yavapai-Apache Nation, *et al.*, state, is that "Congress has favored a 'hands off' approach with regard to tribal sovereignty." *Yavapai*, at 10.[12] Congress supports tribes in many ways; it supports tribal sovereignty to the

[11] The Ninth Circuit also approvingly quoted the Eighth Circuit's decision at issue here that, under the so-called "Second *Montana* Exception," the " 'desire to assert and protect excessively claimed sovereignty' " is not a sufficient tribal interest to create tribal jurisdiction where it has been abrogated. *Pease*, 96 F.3d at 1175, n.5.

[12] Yavapai properly list among the various acts of Congress "reaffirming tribal sovereign authority" a variety of environmental laws, including the Clean Water Act. Yavapai at 10, n.9, citing, among others, 33 U.S.C. § 1377. It is notable, and correct, that Congress in § 1377 of the Clean Water Act "reaffirmed" tribal authority. It did not extend it; and, *amici* respectfully submit, contrary to an allusion by the plurality in *Brendale*, 492 U.S. at 428, it did not delegate federal power to tribes in this section. Both the structure of the section, which provides for treating tribes as states in specified instances, and the Act, under which states exercise only their own pre-existing power, support the Environmental Protection Agency's conclusion that Congress did not delegate federal power in this provision. 56 Fed. Reg. 64876, 64879-80.

extent it already exists. But, since the Dawes Act era when Congress abrogated many aspects of tribal sovereignty in many instances, particularly over nonmembers, Congress' fulsome support of tribes has not included revival and extension of authority over nonmembers. Congress' many acts in support of tribes evince the intent to improve their situation and that of their members within the limits of their existing legal authority. Congress has not extended those limits.

C. Likewise, the growing efficiency of tribal governments and their increasing competency cannot create inherent sovereignty where it does not exist. Efficiency, even ability, is not now and has never been in these United States a source of sovereignty. *New York v. United States*, —— U.S. ——, 112 S.Ct. 2408, 2434 (1992); *United States v. Unzueta*, 35 F.2d 750, 752, (D.C. Neb. 1929), citing *Clairmont v. United States*, 225 U.S. 551 (1912), which held a railroad right of way granted by Congress to have been withdrawn from the Flathead reservation, for the proposition that "the mere difficulty of (split jurisdiction) enforcing state authority over a strip of land extending through an area under federal jurisdiction is not controlling."

D. Finally, the distinction Petitioners and their supporters strain to draw between a tribes' regulatory jurisdiction over nonmembers, which they recognize the Court has limited, in most cases, to tribal members and tribal property, and its adjudicatory jurisdiction lacks both merit and footing in the law. While it is true that commonly two separate branches of government exercise regulatory and adjudicatory jurisdiction, these powers derive from the same source—the sovereignty of the government that created them—and cannot exceed that source in reach. There is no basis for distinguishing between "regulatory sovereignty" and "adjudicatory sovereignty." Courts, in themselves, do not have "sovereignty," just as regulatory agencies do not. The sovereign has sovereignty which its

courts and agencies exercise through their jurisdiction, given them by the sovereign. Thus, tribal adjudicatory jurisdiction cannot exceed the sovereignty of the tribe.[13] *See Pease*, 96 F.3d at 1175; citing the *en banc* opinion below and rejecting the argument the tribe's adjudicatory jurisdiction exceeds its regulatory jurisdiction. *Amici* United States' argument in this regard contains the seeds of its failure. They note, imprecisely, that states in some instances adjudicate matters between nonresidents. They then equate tribes with the several states, implicitly assuming one of the key issues here—that tribes possess "territorial jurisdiction" just as do states—and argue tribes too should have the authority to adjudicate matters between "nonresidents," that is, "non-Indians." But tribes are not states.[14] They have no constitutional standing as

[13] *See* Felix Cohen, *Handbook on Federal Indian Law*, at 145 (1971). Noting that the power to administer justice follows and flows from the power of "self-government," Cohen offered the example that if a tribe has the power to regulate "marriage relationships of its members, it necessarily has the power to adjudicate . . . controversies involving such relationships." He thus concluded, "the judicial powers of the tribe are co-extensive with its legislative or executive powers." This is logical and well-grounded in the Court's decisions. It rebuts the claim that adjudicatory jurisdiction can be unhinged from its sovereign source and reach out, a free agent of tribal power, unmoored and disembodied from its only source of authority, tribal inherent sovereignty.

[14] Moreover, "non-residents" are not equivalent, in the context of tribal power, to "non-Indians." First, on numerous reservations, non-Indians and Indians who are nonmembers are residents of the reservation. In the case of the Flathead reservation, 81-82% of the population consists of nonmembers of the tribes; approximately 50% of the reservation land is owned by nonmembers. Second, in state courts, non-residents enjoy the full complement of federal rights, including constitutional rights, which extend to civil as well as criminal matters. *Cf. Tull v. United States*, —— U.S. ——, 107 S.Ct. 1831 (1987), detailing right to jury trial in civil enforcement matters. Juries limited to a particular race and ethnicity, excluding by law persons of the defendants' race or ethnicity, are clearly unconstitutional. Yet in most if not all tribal courts, juries are limited to tribal members. *Cf.* Flathead Tribes Law and Order Code, Ch. I, § 7.3, "eligible jurors shall be residents of the Flathead Reservation and enrolled members of the Tribes who are qualified to vote. . . ." Similarly, in state courts, judges cannot be limited to a particular race and ethnicity. Yet in most if not all tribal courts, race and ethnicity—tribal membership—is an explicit criterion. *Id.* at § 3.4, eligibility to serve as tribal judge limited to tribal members.

sovereigns, lack any constitutional constraints in governing, and, as a result of their status within the United States, exercise limited, quasi-sovereign powers over internal matters subject to the plenary power of Congress.

3. Once past these thickets then, the resolution not only of this case but the general issue of tribal jurisdiction over nonmembers requires the application of two interrelated analyses, both of which result in the conclusion the Tribes lack the sovereign power they assert.

A. First, Congress' acts and the decisions of the Court clarify an Indian tribe does not possess territorial sovereignty and lacks inherent sovereign power over nonmember conduct on non-tribal property, an easement, within the exterior boundaries of a reservation but alienated to one of the States and from which the Tribe has no power to exclude anyone. The Court's decisions, contrary to Petitioner's suggestion, from its earliest encounter with this issue, *Fletcher v. Peck*, 6 Cranch 87, 147 (1810)[15], to the present day determine this conclusion. *Montana*, 450 U.S. 544 (1981); *Brendale*, 492 U.S. 408 (1989); *Bourland*, 508 U.S. 679 (1993).

B. Second, when analyzed against the Constitution, its allocation of powers among the two sovereigns it establishes and its guarantees of certain fundamental rights to citizens, tribal sovereign power over nonmembers is revealed as anomalous and, if such power ex-

[15] As noted by the Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) Mr. Justice Johnson, concurring in *Fletcher v. Peck*, stated that the overriding sovereignty of the United States had reduced tribes' sovereignty by divesting them of the right of governing anyone but themseleva.

ists at all, it should be closely cabined. The Constitution, as conceived and amended, allowed the exercise of sovereignty in the United States by only two entities—the national sovereign and the states. It established a careful balance of sovereign power between these. It guarantees to individual citizens certain fundamental rights; it reserved to the states and to the people those powers not delegated to the United States or reserved by the states. Tribes have no standing under the constitution as sovereigns. Their power exists at the sufference of Congress, which has plenary authority over Indian affairs, and which, unlike Tribes, the Constitution limits in its power to act or authorize actions. Indian tribes, not thus constrained, have been allowed to engage in policies and take actions against those within their sovereign power repugnant to the constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, n. 7 (1978). This is anomalous. In the case of tribal members, they can, perhaps, be presumed to have consented to such government. In the case of a nonmember seeking a tribe's permission to access property over which it retains the power of exclusion, this presumption may also be warranted. A tribe presumably could extract such consent in exchange for doing business with it. But in the case of a nonmember on nontribal property, over which the tribe lacks the power of exclusion, there is no basis for this presumption.

Moreover, nonmembers are excluded from citizenship—full and equal participation in the process of government—in tribes. They are excluded either because of their race, their ancestry, or their ethnicity. And because of these immutable factors, they have not and cannot give their consent to be governed by a tribe.

Amici therefore argue the lack of constitutional standing for and constraints on tribal authority and the undisputed, fundamental constitutional rights of U.S. citizens preclude tribes from exercising sovereign power over nonmembers absent some other source of acquiring such authority, such as the power to exclude or the explicit consent of the nonmember.

ARGUMENT

I. A TRIBE'S SOVEREIGNTY, UNFOUNDED IN THE CONSTITUTION, LIMITED TO ASPECTS OF SOVEREIGNTY NOT INCONSISTENT WITH ITS DEPENDENT STATUS, CONCERNING ONLY CONTROL OF INTERNAL AFFAIRS, CANNOT SURVIVE THE ABROGATION OF THE POWER TO EXCLUDE.

Petitioners and their supporters argue from the assumed premise that tribes are sovereigns equivalent to states. This, of course, is erroneous. The corollary derived from this premise, that tribes possess territorial jurisdiction, is also erroneous.

The first principle of tribal sovereignty is not that it is inherent, which explains little more than its lack of constitutional grounding or constraints, but that it is limited, quasi-sovereign in nature, containing aspects but not the full plumage of sovereignty[16]. It is limited first because the Constitution does not recognize tribes as sovereigns. *United States v. Kagama*, 118 U.S. 375 (1886).

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[16] Limited sovereignty, of course, entails limitations not only on governmental power but also governmental responsibility. This is borne out in the practical responsibilities of tribal and state governments. State and local governments have considerable responsibility to provide services to tribal members just as to nonmember citizens. Within the boundaries of many reservations, they provide law enforcement and fire protection, schools, municipal services such as sewer and water, road construction, maintenance, and improvement. Of no little consequence, they must aslo provide the machinery of fair and equal elections for state and local campaigns as well as access to civil courts. The federal government also, of course, provides many governmental services to tribes and their members. Sovereign power, then, clearly has a dual nature, one imposing responsibilities on government the other the power to fulfill these. Tribes' limited sovereignty is matched by their limited responsibilities, which run solely to their members.

As to nonmembers, whatever the particular factual situation, the general rule is that tribal governments lack jurisdiction over non-members. *Montana*, 450 U.S. at 565; *Bourland*, 113 S.Ct. at 2318. Tribes' incorporation into the United States caused their "inherent sovereignty . . . [to be] divested to the extent it is inconsistent with the tribes dependent status, that is, to the exent it involves a tribe's 'external relations.'" *Brendale*, 492 U.S. 425-26; citing *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).[17] The Court has consistently held "that the regulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of 'external relations' is divested." *Brendale, supra*, at 427; quoting *Wheeler, supra*, at 326.

In *Montana*, the Court said it "defies reason" that Congress would have intended the Tribe to retain such power after it had opened tribal property to nonmembers and abrogated the tribe's power of exclusion, because nonmembers have no voice in tribal government. *Id.* at 559, n.9, 561; *Brendale*, 492 U.S. at 422-425 and *Bourland*, 113 S.Ct. at 2316, 2318. The Court noted the possibility that in exceptional circumstances, when a tribal government demonstrates that the nonmember conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the *tribe*" it then "may" have some power over the nonmember conduct. *Id.* at 566. It did not say that even if the circumstances outlined were proven a tribe would have such authority. It only said that it "may." *See Brendale*, 492 U.S. at 428, emphasizing this. This possible exception to the general rule, however, was not part of the Court's holding and is *dicta*. *See Brendale, supra, Red Fox v. Hettich*, 494 N.W. 2d 638, 646 (1993): "*Montana* went on to note, without deciding, that a tribe may have other authority as well."

[17] As the Court noted in *Brendale, supra* at 426, n.9, a tribe's retained inherent sovereignty could also be divested by treaty or statute.

The Court has subsequently indicated that a showing by a tribe under this concept would not cause the recreation of sovereignty Congress had abrogated but would give rise to a federal cause of action. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. ——, 112 S.Ct. 683, 692, 116 L.Ed.2d 687 (1992);[18] *Brendale*, 492 U.S. at 430-431; *Bourland*, 113 S.Ct. at 2320, n.15, 2321. In *Brendale* the Court carefully refuted any suggestion that such narrow power could include police power. *Brendale*, 492 U.S. at 421 (noting the Ninth Circuit had found the Tribe did have police power), 429, n.11 (stating that equating a tribe's retained sovereignty with a local government's police power "is contrary to *Montana* itself").

As to non-tribal property in open areas from which the tribe cannot exclude anyone, six members of the Court ruled that a tribe has no sovereign authority over nonmember activity. To be sure, the plurality written by Justice White did not rely on the determination of whether the nonmember land was in an "open" or "closed" area. But this fact offers no succor to Petitioners because the plurality (White, Rhenquist, Kennedy, Scalia) said that tribes have no such authority in any case, whether the land is in an open area or not. *Id.* at 430-32. The plurality posited that, if a tribe made a proper showing this would not recreate abrogated sovereignty but, in the right circumstance, it would give rise to a federal cause of action. *Id.* at 430-31.

[18] Although the *Yakima County* decision did not concern tribal government authority over non-members, the court's characterization of the "very narrow" powers of tribal governments over nonmembers, as well as its approving reference to the "protectable interest" analysis of the *Brendale* plurality, deserve great weight because of the overwhelming support they received in that case (8-1). *Id.* at 692.

> "The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land. The inquiry thus becomes whether and to what extent the tribe has a protectable interest in what activities are taking place on fee land within the reservation. . . . But, as we have indicated above, that interest does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe." *Id.*

As to non-tribal property in open areas, the concurrence agreed. The concurrence did not even mention the "Second *Montana* Exception" or bother to examine the effects of the nonmember activity on the tribe, implictly dismissing this as a factor in the sovereignty question. Rather, they concurred in the judgment of the plurality as to non-tribal property in an "open" area of the reservation. *Id.* at 444-447. While disagreeing with the plurality's decision that tribes lack jurisdiction over nonmembers on non-tribal property in all cases, the concurrence implicitly adopted, without comment, the plurality's position that as to nonmember activity in this area the tribe could only have a cause of action: "So long as the land is not used in a manner that is preempted by federal law, the Tribe has no special claim to relief." *Id.* at 445.

Thus, in its first review of the application of its *dicta* from *Montana*, four members of the Court said it is not a basis of sovereign authority in any situation; and two reached the same conclusion as to "open" areas.

Later, in *Bourland* the Court held that tribal government lacked jurisdiction over nonmember hunting and fishing on fee land and in waters over fee land owned by the federal government. The precise question in *Bourland*, which set it apart, if only slightly and temporarily, from the ambit of the Court's *Montana* and *Brendale* decisions, was whether the principles enunciated in those cases applied to property owned by the federal government. Emphatically holding they do, the Court's opinion in *Bourland* enunciated the rule that there can be no tribal jurisdiction over nonmember activities in areas "broadly opened" to nonmembers.

The Court emphasized that when Congress opens reservation lands to nonmembers, "[t]hese statutes *clearly* abrogated the Tribe's 'absolute and undisturbed use and occupation' of these tribal lands . . . and thereby deprived the Tribe of the power to license non-Indian use of the lands." *Id.* at 2321. (Emphasis added). The Court stated "the reality . . . after *Montana* [is that] tribal sovereignty over nonmembers' cannot survive without express congressional delegation,' 450 U.S. at 564, and is therefore, not inherent." *Id.* at 2320, n.15.

Amici contend that in *Bourland*, the seven-member majority made explicit the implied ground of agreement between the *Brendale* plurality, which held that a tribe simply has no jurisdiction over nonmembers on non-tribal property, and concurrence, which held that as to land in an "open" area a tribe had no jurisdiction over nonmembers, but in a "closed" area the tribe had jurisdiction: when the property in question is part of an area "broadly opened" by Congress to entry by nonmembers the tribe can have no jurisdiction over nonmembers. *Id.* at 2318.

As to such an area, then, the "Second *Montana* exception," if proven by a tribe, would support a cause of action in federal court to enjoin the offending nonmember activity, but not the re-creation of tribal inherent sovereignty previously abrogated my Congress.[19] In closed areas where

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[19] As noted by the Court in *Bourland*, 113 S.Ct. at 2320, n.15, if treated as a source of re-creating sovereign authority rather than a cause of action, the second *Montana* exception contains a logical glitch. That is, once abrogated, inherent sovereignty could not simply be magically generated again by the appearance of some activity which the tribe deemed a threat. Once Congress has taken action abrogating a power, under the Supremacy Clause it seems not only illogical but insupportable to allow that it could be reconstituted in the right circumstance upon the assertion of a tribe.

the tribe has another logical and unabrogated source of authority—the power to exclude—it may retain also the power of limited sovereignty.

Many Tribes and federal agencies, however, have interpreted the second *Montana* exception far beyond its logical limits, ignoring the court's indications that tribes may have only "very narrow" powers over nonmembers, until this possible exception has swallowed the rule. *Cf. EPA Final Rule Pertaining to Water Quality Standards,* 56 Fed. Reg. 64876, 64877-80 (1991), construing this exception to support the conclusion that if an applicant tribe demonstrates one of its members uses water within a reservation, it then has sovereignty to establish water quality standards for the reservation. In the instant case, the tribe and the United States urge the Court to reverse the presumption against tribal sovereignty over nonmembers and ratify their construction of the second *Montana* exception as authorizing the powers of general government in a tribe over nonmembers even in areas from which it cannot exclude anyone.

The rule proposed by *Amici* would obviously leave to tribes all their powers over internal relations, including their members and lands. The work of government required for such matters is not inconsiderable. Moreover, such a rule is not only solidly in keeping with the Court's previous 190 years of precedent but also comports with the constitutional concerns and limits preserving the powers of states and the right of individuals.

II. THE CONSTITUTIONAL STRUCTURE AND THE FUNDAMENTAL RIGHTS OF INDIVIDUAL CITIZENS PRECLUDE THE EXERCISE OF EXTRA-CONSTITUTIONAL SOVEREIGN POWER BY A TRIBE OVER NONMEMBERS IN OPEN AREAS OF A RESERVATION.

That the assertion of a Tribe's inherent sovereign power over nonmembers involves constitutional issues of the first magnitude brooks no dispute. Petitioners and their amici

supporters address this issue with varying degrees of concern. Petitioners state "there is nothing offensive about forcing non-Indians involved in civil disputes on Indian land to appear in tribal court." Pet. Bf, at 7, citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). Their supporters, in particular amici Yavapai, recognize the exercise of tribal power over nonmembers raises troubling constitutional issues, arguing such concerns animated the Court's decision in *Montana.*[20] At least one tribal court has directly recognized this fact, stating:

> "[t]he exercise of tribal jurisdiction over non-Indians is replete with constitutional issues. Some exercise of inherent tribal authority over non-Indians is inconsistent with various allotment acts or other acts of Congress. In those instances the Supremacy Clause requires that tribal jurisdiction not extend to non-Indians." [21]

Commentators have long recognized the constitutional incongruities endemic to Tribes' assertions of sovereign power to govern people whom they exclude, on the basis of race, from participating in government. Recent scholarly commentary recognizes the Court's decisions concerning tribal authority over nonmembers [22] hew to the consti-

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[20] Yavapai's proposed solution, however, lacks merit. Their proposed "test" would reverse not only the presumption against tribal sovereignty over nonmember activity on fee land but also the prohibition against tribal criminal authority over nonmembers, except in those cases where the Constitution requires a grand jury. It, in essence, would establish a strong presumption of tribal sovereignty in all instances, except in the more "egregious" situations, which in Yavapai's view, the Court would have to address on an *ad hoc* basis.

[21] *Middlemist, et al. v. Pablo, et al.,* 23 ILR 6141, 6143, n.5 (1996), Tribal Appellate Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

[22] *See Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978); *United States v. Wheeler,* 435 U.S. 313 (1978); *Montana v. United States,* 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and*

tutional requirement that sovereign power derives from the consent of the governed, and therefore tribal power over nonmembers is, at the least, suspect. L. Scott Gould, "The Consent Paradigm: Tribal Sovereignty at the Millenium," 96 Columbia Law Review 809-902 (May 1996). Professor Gould, in fact, finds the Court has essentially decided that tribal sovereign power extends only to those whom it can be said have given the consent of the governed—tribal members. Gould, *supra*, at 810, noting the earliest decisions of the court applied the concept limiting tribal sovereignty to members. Thus, Gould, no opponent of expansive tribal authority, concludes "full territorial jurisdiction" based on "doctrines of inherent sovereignty and trust responsibility" cannot provide a source of authority over nonmembers because "they lack a textual basis in the Constitution."[23] *Id.* at 899. Lacking such a basis,

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Bands of the Yakima Nation, 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

[23] Professor Gould argues this lack of constitutional footing for tribal authority over nonmembers can only be made good by explicit congressional action conferring "full territorial sovereignty." He notes, however, that others have opined the remedy for this is the development of a "penumbral, fundamental right," or protection for tribes under the First or Ninth Amendment, or that tribes have "rights as separate peoples" because they are not subject to equal protection requirements. Gould at 898; citing Nell Jessup Newton, Federal Power over Indians: Its Sources, Scope and Limitations, 132 U. Pa. L. Rev. 195, 245 (1984) (penumbral right); Kevin J. Worthen, Sword or Shield: The past and Future Impact of Western Legal Thought on American Indian Sovereignty, 104 Harv. L. Rev. 1372 (1991) (Tribes rights under First Amendment); Russell L. Barsh & James Y. Henderson, The Road: Indian Tribes and Political Liberty 112, 264-267 (1980) (Ninth amendment protects tribal sovereignty as fundamental right); David C. Williams, The Borders of the Equal Protection Clause: Indians as Peoples, 38 UCLA L. Rev. 759 (1991) (lack of equal protection provision allows giving tribes rights as separate peoples). Other commentators argue tribes' diminished sovereignty can be constitutionally extended to nonmembers only by enactment and ratification of a constitutional amendment. *See* Fergus M. Bordewich, *Killing the White Man's*

Gould agrees with other commentators that assertions of tribal sovereign power over nonmembers fail because they "too starkly challenge western notions of democratic self-government.'" Gould at 900. *Amici* agree.

"Democratic self-government" has been viewed as a fundamental right requiring the government to obtain the consent of the governed for no small amount of the history of western and "Anglo-American" thought. The Declaration of Independence explicitly asserts that to secure fundamental rights governments must "deriv[e] their just powers from the Consent of the Governed. . . ." The rights of full and equal opportunity to participate in government are fundamental, and in our system immutable, implacable rights as against the government. That is, as a free people, citizens of the United States have, and under our constitution, unless that fundamental distribution of powers is radically altered, will never relinquish, the rights of full and equal participation in their governments, which is the exchange for the consent of the governed.

Claims of tribal sovereignty over nonmembers on non-tribal property, based on no other source of authority than the tribe's limited sovereignty or the concept of the second *Montana* exception, conflict head on with these rights and those they secure.

Indian: Reinventing Native Americans at the End of the Twentieth Century, at 338.

Gould is not sanguine about these potential remedies to the "problem" of limited tribal sovereignty. Believing Congress unlikely to enact legislation to restore "full territorial sovereignty," he explains "the consent paradigm fits too comfortably with Anglo-American notions of individual rights to be easily displaced." Gould at 900. One reason is that Tribes "efforts to assert inherent power . . . 'too starkly challenge western notions of democratic self-government'" because they exclude whole classes of people, often residents of the area who make up the majority of the population, on the basis of race and ethnicity. *Id.*; quoting Robert Clinton, Reservation Specificity and Indian Adjudication; An Essay on the Importance of Limited Contextualism in Indian Law, 8 Hamline L. Rev. 543, 568-69 (1985).

It "defies reason" (*Montana* at n. 9) and is "inconceivable" (*Brendale*, at 437 (concurrence)) that Tribes would retain jurisdiction over nonmember activity on nontribal property in open areas precisely because of this. *Duro v. Reina*, 495 U.S. 676, 693-694 (1990); *see also Brendale*, at 446-447 (concurrence).[24] No governmental deprivation is more odious, more stigmatizing as the mark of a lesser citizen, more corrosive of democracy and respect for law than deprivation of the right to vote and hold office.[25]

The enduring words and phrases in legal and political discourse are those which convey fundamental tenets. Ironically, by their very force and nature as the most basic blocks of law and society they are the more easily hackneyed. Nonetheless, familiarity cannot leach away their import as the foundational limits of our system, for any law or policy at odds with the basic principles may not long stand:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

Declaration of Independence.

From this tap root of legitimate government in the United States runs a direct line to the first words of the Constitution: "We the people of the United States . . . do ordain and establish this Constitution . . ." (Preamble, Constitution.) Government power, therefore, derives only from the people and may not exceed or violate the grant of power to which the people consented. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *M'Culloch v. Maryland*, 17 U.S. 316 (1819). Thus, "[i]n this Nation each sovereign governs only with the consent of the governed." *Nevada v. Hall*, 440 U.S. 410, 426 (1979).[26]

The price of this consent constitutes the single most important element of the scheme of government created in the Constitution—the right of full and equal participation in the government under which one must live:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

In unequivocally holding that a citizen has a fundamental right to equal participation in the political process, the

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[24] "Moreover, it is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominantly owned and populated by nonmembers, who represent 80 percent of the population yet lack a voice in tribal governance." *Id.*

[25] The severity of this sanction in a democracy was well understood in the Periclean age of Greece. In democratic Athens traitors siding with the Persians in their invasion of Greece under Xerxes were not put to death. Instead, they and their famies were "put on the list of the disenfranchised." Plutarch's Lives, "Themistocles," Published by Walter J. Black, Inc. (1951) at 67. From then on, traitors and their families could not participate in the political life of the city or partake of the benefits of citizenship. Today, this sanction is reserved, in some states, to felons. In others, state authorities lack the power under their own laws to so proscribe even violent, recidivist felons.

[26] The Flathead tribes' Appellate Court recently issued a ruling in which it held the Tribes' sovereignty, like that of the State of Montana and the United States, "derive from the sovereign tribal membership"—i.e. the consent of the governed. *Moran v. Council of the Confederated Salish and Kootenai Tribes, et al.*, 22 ILR 6149, 6155; *and see* 6156, n.B0 (1995): "While the Tribes, i.e. the sovereign membership, delegated power to the Tribal Council . . . the *authority* of the Tribal Court originates from the inherent sovereign judicial power of the *Tribes* (membership), not from the Tribal Council." (Emphasis and parenthetical in original.)

Court recognized the even greater importance of the predicate.

> "The right to exercise the franchise in a free and unimpaired manner is preservative or other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).
>
> "[T]he right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right; a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process." *Plyer v. Doe*, 457 U.S. 202, 233 (1982).

Far from providing a reason to dismiss the constitutional rights and concerns of nonmembers, that tribal governments are not limited by the Constitution in wielding their power "is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis of power within our constitutional system." *Duro*, 110 St.Ct. at 2064; citing Justice Stevens' dissent in *Merrion*, 455 U.S. at 172-173.

Government in the absence of consent, indeed, unconstrained by the limitations in the Constitution protecting the rights of individuals, destroys the fabric of legitimate laws, to which the government may expect and demand compliance, by destroying the connection of the governed to the government. *See Powers v. Ohio*, ——U.S.——, 111 S.Ct. 1364, 1368, 1369 (1991). Reverend Martin Luther King, Jr. wrote:

> "The denial of this sacred right [to vote] is a tragic betrayal of the highest mandates of our democratic traditions and it is democracy turned upside down.
>
> So long as I do not firmly and irrevocably possess the right to vote I do not possess myself. I cannot make up my mind—it is made up for me. I cannot live as a democratic citizen, observing the laws I have helped to enact—I can only submit to the edict of others."

"Give Us the Ballot—We Will Transform the South," address delivered May 17, 1957, *reprinted in A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 197 (James M. Washington ed., 1986). Quoted in dissent of Tang, Circuit Judge, in *Members of California Democratic Congressional Delegation v. E.U.*, 790 F.Supp. 925, 933 (N.D.Cal. 1992). Justice Tang averred, without plausible threat of contradiction, that "[t]he right to vote sits at the very core of representative democracy. It is, moreover, a tool for self-help." *Id.* at 935.

Government without consent, if allowed, will lead to a breakdown in authority and the society it seeks to govern.[27] In a seminal study from a social science perspective of the requirements of a legitimate, just society, John Rawls, describing political liberty as a component of what he viewed as the most important factor in shaping a just society—equal liberty—wrote:

> "The Principle of equal liberty . . . requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes laws with which they are to comply. Justice as fairness begins with the idea that where common principles are necessary and to everyone's advantage, they are to be worked out from the viewpoint of a suitably defined initial situation of equality in which each person is fairly represented. . . . If the state is to exercise a final and coercive authority over a certain territory, and if it is in this way to affect permanently men's prospects in life, then the constitutional process should preserve the

[27] At both the "micro" and "macro" levels of social science, it is recognized that some level of control over a governing process for those subject to it is necessary to obtain compliance. *See* "Procedural Justice and Regulatory Compliance," 20 Law and Human Behavior, No. 1 (1996), at 83, 84, 93.

> equal representation of the original position to the degree that this is practicable."

John Rawls, A Theory of Justice 221-222 (1973). *See also*, Richard Lempert and Joseph Sanders, "Law and Social Science 284-291 (1986).

However, anticipating the negative effects of government without the consent of the governed is not a necessary basis for protecting these basic rights. Their fundamental place in our Constitutional system suffices. Petitioners and their supporters, however, claim such concerns can be finessed, that it is not "offensive" to "force" nonmembers to come within the power of a tribe, that the dignity and integrity of tribal sovereignty (which cannot claim a constitutional source) requires nonmembers' rights be compromised and that nonmembers be satisfied with the lesser protections tribes may offer them under their various systems.

But it is true in Indian law as in other areas of the law that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to strict scrutiny.'" *Adarand Constructors, Inc. v. Pena*, ——U.S.——, 115 S.Ct. 2097, 2106 (1995); quoting from *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). The Court further observed: '"[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality . . ." *Adarand* at 2106.

The authority the Tribes seek to exercise here—civil adjudicatory jurisdiction over torts—is one of the most important powers of general government and derives from police powers, which tribes lack. *Brendale*, 492 U.S. at 421, 429, n.11. In the United States, governments exercising general governmental power must adhere to the one-person one-vote rule of *Reynolds v. Sims, supra. Avery v. Midlands County*, 390 U.S. 474 (1968), as cited in *Ball v. James*, 451 U.S. 355, 364 (1981). Only when a government exercises narrow powers limited to its members—not normal governmental activities affecting all people wtihin the area—may it stray from this principle. *Ball v. James*, 451 U.S. at 364.

Contrary to Petitioners' assertion, it is "offensive" under federal law to impose a system of government which excludes people on the basis of their race or ethnicity. In this particular case, for example, it is unconstitutional to subject a civil defendant to a jury from which all but a particular race of people have been excluded. *Edmonson v. Leesville Concrete Co.*, —— U.S. ——, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); applying principles of *Batson v. Kentucky*, 476 U.S. 79 (1986) to civil trial. An unbiased jury, selected through non-discriminatory processes, and the right to serve on such a jury, is an essential component of securing the "acceptance of the laws by all of the people." *Powers v. Ohio*, ——U.S.——, 111 S.Ct. 1364, 1369 (1991); *see also United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992), holding exclusion of venireperson on basis of sex violative of equal protection.

There is a limit to the scope of legitimate power of every government in the United States. That limit is the consent of the governed. It does not detract from the dignity or integrity of tribal governments to be so limited. To be sure, it may limit a tribe's aspiration to power. However, Congress imposed such limits and they cannot be ignored to the detriment of nonmembers' rights. Limited to their members and nonmembers on tribal-property, much work of governing remains for tribal governments. There remains much that the United States will yet support in developing tribal institutions and cultures. But this need not, and constitutionally cannot, entail the destruction of nonmembers' rights.

CONCLUSION

Amici therefore urge the Court to affirm the lower court's decision by establishing the rule that tribes cannot exercise sovereign power over nonmembers except when the nonmember, through a knowing, overt act, such as accessing tribal property over which the tribe retains the power of exclusion, has consented to such extra-constitutional power.

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